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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO., INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLISHING, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

Restraint on the Press

The appellants have argued that the statute on its face is a restraint on the press in that it seeks to control the movement of literature across state boundaries and thus to reach those non-residents responsible for the composition and publication of the literature (Brief, pp. 6-13). The appellee counters by stating that it is a restraint that this court approved in *Kingsley Books, Inc.* v. *Brown.* Aside from appellants' doubts as to the validity of the statute in *Kingsley* (a doubt shared with them by four justices of this court), it is plain that this statute bears little similar-

ity to the New York statute. New York sought to restrain the local purveyor of the publication. The intent of the Arkansas statute is mainly directed toward non-resident authors and publishers. That is the chief thrust of appellants' argument.

Nor does appellee answer appellants' objection to the restraint upon non-resident authors and publishers, by arguing that each state has inherent authority to legislate with respect to distribution of publications. The state may have power to legislate with respect to publications within the state. But this still leaves unanswered whether a state may control and penalize authors and publishers in another state who transmit books into Arkansas, and subject non-resident authors and publishers to extradition to Arkansas to stand trial for a felony because the books they write or publish do not meet the standards of a village or county in Arkansas. Appellee fails in his reliance on *Alberts* for support, for that case dealt with a local question, "keeping for sale" and "advertising" within the State (p. 493).

And any attempt by appellee's counsel (page 11 "B", Brief for Appellee) to concede away the scope of the statute is without effect, for not only does he not have authority to repeal a legislative enactment, but his concession does not touch upon the basic structure of the statute which has resulted in a judgment against these appellants. The statute has operated against these non-resident appellants and the judgment appealed from is the manifestation of the operation of the statute.

In complaining against the attempt of Arkansas to invade the federal postal and interstate spheres, appellants do not

depart from the questions raised by them in the Statement as to Jurisdiction (as appellee suggests) for clearly that argument was made (Statement as to Jurisdiction, pp. 15-17). In making the argument as to the restraints on the press with respect to transmission of literature by non-residents into Arkansas, it is inevitable that reference to the use of the mails and interstate commerce would present itself. In pointing to the postal powers and interstate commerce, appellants have included subsidiary questions that are fairly comprised within the scope of the broad question of the restraint on publications (Rule 40(d)). Any restriction on the freedom of publication necessarily invites reference to the manner in which the restriction is manifested. In this case the statute specifically refers to the use of the mail and other means of delivery. Therefore, the appellee is not correct in complaining that appellants have extended their questions presented.

Moreover, the appellants do not limit their observations of restraint to the invasion of the postal and interstate commerce powers. They point to the interference with the publisher and author by seeking to punish them for having transmitted from their home state, literature which a county in the receiving state finds offensive. And appellants have shown that since this court has already held that a state could not interfere with the importation of liquor, it follows all the more, that it cannot restrain the shipment of literature, since books and magazines rank higher in the constitutional scale of values.

Appellee suggests (p. 11, last paragraph) that appellants object to the method by which jurisdiction was obtained over them. On the contrary, appellants expressly disavowed

an attack on that procedural deficiency (Brief, 12). Appellants pointed out that the procedure for obtaining jurisdiction over authors and publishers who have no contacts with Arkansas merely emphasizes the bundle of defects that permeate this statute's eagerness to restrain non-resident authors and publishers.

Vagueness

The appellants do not argue in this court the vagueness of the definition of "obscenity". Their attack as to vagueness is that of "community standards" as appears on the face of the statute and as applied by the court. This question was tendered in appellants' answer (R. 7, paragraph (c)). That issue was renewed in the questions presented in this court. The appellee therefore is incorrect in asserting that the issue was not accepted by this court for review.

Appellee does not adequately answer the contentions that the definitions of non mailable matter are clear. The statute speaks of obscene mailable matter,—a contradiction in itself. 18 U.S.C. 1461. Non mailable matter could be mail that was not sent second class, nor was it ever submitted for a determination to the Post Office or it could mean matter shipped by means other than the post office.

The Brief of Council for Periodical Distributors Associations

Although CPDA argues that the judgment below was wrong, because the court did not use a national standard in determining obscenity, it nevertheless urges that the statute, its offspring, is valid. Diametrically opposed to

CPDA is a brief expected to be filed by the American Book Publishers Council, Inc., as *amicus curiae* an organization whose credentials are high, as is its experience. That organization not only argues that the statute is repugnant to the Constitution for the same reasons as appellants, but goes further, and argues that the statute is defective in that the definition of "obscenity" lacks the necessary element of being utterly devoid of social importance.

The protestation of CPDA that it seeks to prevent the dissemination of "objectionable publications" is general, for it can be assumed that the American Book Publishers Council or any civil libertarian is interested in the spread of literature of high quality. What appears at stake here to CPDA drafters of the statute however is a sincere attempt at vindication of their draftsmanship. And they frankly announce that they are the progenitors of the statute (p. 4). Mothers are notoriously known for translating the vices of their children into virtues. Their zeal therefore should be treated with reserve.

What the curious spectacle of CPDA reveals, is that there are some people who are willing to trade their birthright for an illusion of security. It is professed by that brief that for the sake of obtaining security for local dealers in the form of an official imprimatur, it is desirable that publishers and authors should be subjected to the rigors and insecurity of this statute. If security be all that is sought, then a reversion to the licensing laws of 300 years ago would afford a fuller measure of that security. And if one wishes illumination on the wisdom of accepting censorship in trade for security, reference is made to the New York case of *Hughes Tool Company* v. *Fielding*, 297 N.Y. 1024, affirming 272 A.D. 1048, affirming 188 Misc. 947, where

after the exhibitor of a motion picture had succeeded in obtaining a license from the state motion picture licensing board, was nevertheless threatened with criminal prosecution by the New York City police for obscenity.

The "*in rem*" proceeding provided by the statute is to provide a judicial imprimatur for a publication or its condemnation. Had this procedure been in effect years ago, it could have resulted in the permanent ban of books which time has disclosed to have been erroneous. With the Arkansas statute one county in the state may bar a publication and another may approve. Moreover, there is no time limit as to the force of a judgment, so that it does not insure against the mistake of a "foolish judgment" against another *Queen Mab*.

If security is the underlying thesis of CPDA's statute, then the security of the non-resident publisher and author should also be considered.

Since security for the local dealer is the concern of the statute, as *amicus* urges, then the law should confine itself to its local characteristics. The New York statute, 22-A, has such local characteristic; it does not seek to involve non-residents.

This Arkansas statute however does not content itself with reaching local vendors. And therefore CPDA is wholly inaccurate in attempting to assimilate this statute with that approved in *Kingsley Books* v. *Brown*. It bears repetition, that the New York statute does not attempt to reach out of state publishers and authors.

The issues have been disposed of in the briefs filed by the parties and in this one. But there are some errors and misconceptions in *amicus'* brief that should be treated:

The Proceedings Below (CPDA 8)

It is stated that the action was not commenced against appellants and no relief was sought against them. The complaint and the order to show cause (R. 3-4) specifically mention these appellants and direct that they show cause why the relief should not be granted and direct that notice of the application should be served on them by mail. Accordingly, they responded (R. 6).

Criminal Prosecution and Extradition (CPDA 7)

It is argued that there cannot be criminal proceedings with its concomitant of extradition except for a violation of the decree, enjoining distribution. But that is only in the case of "mailable matter". But when other means of transportation are used, or the literature has not received approval of the Post Office Department, criminal prosecution for a felony may follow (Section 2716).

Moreover, even in the case of "mailable matter" prosecution, or contempt proceedings and extradition against a non-resident who has no contacts with Arkansas, may follow, if the decree is violated (Sect. 2725-2726).

It should again be repeated that appellants do not urge that the statute is repugnant to the Constitution because it provides for service of process by mail against non-residents who have had no contacts with Arkansas. That procedural defect is out of this case by reason of the appellants' appearance and failure to object to the service of process. What appellants object to is of greater import than the means of service of process. Appellants object to the dominion a state assumes over non-residents' publica-

tions and the transmission of those publications over state lines. This, we submit, is the gist of appellants' grievance.

The Book is Tried as well as the Publisher (CPDA 14)

It is urged by *amicus* that only the person is tried, not the publication. This is not borne out by a reading of the statute, the complaint or the judgment. In each one a declaration is sought of the obscenity of the book and of its suppression (Sect. 2718(d)(e)(f); R. 2, "Wherefore" clause; R. 29). The statute is double-barreled: it acts against the book as well as the non-resident person.

Postal and Interstate Shipment (CPDA pp. 21-26)

It is assumed throughout by *amicus* that in the absence of interference with postal or interstate regulations, a state may legislate in those areas. The premise is incorrect for it is a principle of constitutional construction that where Congress has indicated uniformity to be desirable, a state may not intrude. The cases supporting this principle are cited in the appellants' brief.

If interference must be shown, it is provided by the Arkansas statute, for it seeks to control "mailable matter", so that if the Post Office Department in New York approves a mailing, nevertheless such "mailable matter" falls subject to control by Arkansas law if a county jury should find the matter "obscene". (Sections 2717, subd. (2), referring to "obscene mailable matter" 2722, 2724, 2726).

The reliance by *amicus* on *Alberts* as holding that a state may do as Arkansas seeks to do, is misplaced. The only

provisions involved in *Alberts* were purely local, "keeping for sale" and "advertising" within the state (p. 493).

There are other misconceptions and contradictions in the *amicus* brief (e.g. that only the terms of an order are in issue, p. 10) that it would be digressive from the main contention of appellants, to pursue each one. The court will recognize them readily.

Conclusion

We respectfully refer to Brief of Appellants, where we submit, appellants have cogently and fully argued that this statute is repugnant to the Constitution of the United States.

Respectfully submitted,

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